Nos. 07-1428, 08-328

In the

Supreme Court of the United States

FRANK RICCI, MICHAEL BLATCHLEY, GREG BOIVIN, GARY CARBONE, MICHAEL CHRISTOFORO, RYAN DIVITO, STEVEN DURAND, WILLIAM GAMBARDELLA, BRIAN JOOSS, JAMES KOTTAGE, MATTHEW MARCARELLI, THOMAS J. MICHAELS, SEAN PATTON, CHRISTOPHER PARKER, EDWARD RIORDAN, KEVIN ROXBEE, TIMOTHY SCANLON, BENJAMIN VARGAS, JOHN VENDETTO AND MARK VENDETTO,

Plaintiffs-Appellants,

v.

JOHN DESTAFANO, KAREN DUBOIS-WALTON, THOMAS UDE JR., TINA BURGETT, BOISE KIMBER, MALCOM WEBER, ZELMA TIRADO AND CITY OF NEW HAVEN,

Defendants-Appellees.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Can a court exonerate a local government's concededly race-based decision to decline to certify civil service exam results without subjecting the decision to strict scrutiny?

2. Can a local government's conceded racial balancing survive strict scrutiny where its only claimed justifications are its three-fold desire to avoid (i) public criticism, (ii) Title VI lawsuits brought by minorities, and (iii) a lack of *statistical* racial diversity?

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INTEREST OF *AMICI CURIAE*[1]

The National Association of Police Organizations, Inc. (NAPO) is a coalition of police unions and associations from across the United States that serves to advance the interests of America's law enforcement officers through legislative and legal advocacy, political action, and education. Founded in 1978, NAPO is now the strongest unified voice supporting law enforcement officers in the United States. NAPO represents more than 2,000 police unions and associations, 241,000 sworn law enforcement officers, 11,000 retired officers and more than 100,000 citizens who share a common dedication to fair and effective crime control and law enforcement.

NAPO's interests in this case are straightforward. Like the firefighter plaintiffs here, many members of NAPO work for government entities that utilize civil service testing in order to determine which law enforcement officers will be promoted, or be deemed eligible for promotion. NAPO's members, and members of organizations that NAPO represents, invest countless hours of study as well as personal funds in order to prepare for civil service exams. How they fare on those exams impacts their careers, the well-being of their families, and their personal pride. NAPO is therefore deeply interested in the

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[1] Petitioners and respondents have consented to the filing of this brief in letters on file in the Clerk's office. Pursuant to S. Ct. R. 37.6, NAPO states that no counsel for a party authored this brief in whole or in part, and that no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief.

fair and lawful treatment of exam results by government entities.

In NAPO's view, to be both fair and lawful, civil service exam results must be handled free from the taint of racial politics. All too often, the process of law enforcement and the satisfaction felt by its participants are undermined by the injection of race-based decisionmaking like that which the lower court conceded was present in this case. This will not do. NAPO submits this brief of *amicus curiae* to explain why the Equal Protection Clause bars a municipality from punishing successful civil service exam test-takers on the basis of their skin color, and why to hold otherwise would do damage to law enforcement organizations across the country.

INTRODUCTION AND SUMMARY OF ARGUMENT

Among the clearest of rules emerging from the last three decades of this Court's Equal Protection jurisprudence is that, without exception, "all governmental uses of race are subject to strict scrutiny." *See Grutter v. Bollinger*, 539 U.S. 306, 326-27 (2003). Once a court determines that racial considerations have entered into government's decisionmaking, there is no room for dawdling. The court must place the decision under a microscope, determine if its justification is compelling and its fit is narrow, and, except in rare circumstances, condemn the decision to eternity.

The governmental decision at issue here presents a textbook case of race-based decisionmaking. The lower court squarely found that the Civil Service Board's refusal to certify the exam results was motivated by the race of those who performed best. *See, e.g., Ricci v. DeStefano*, 554 F.Supp.2d 142, 158 (D.Conn. 2006) ("the evidence shows that race was taken into account in the decision not to certify the test results."). Accordingly, "a most searching examination" calling for "the most exact connection between justification and classification" was required. *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) (citation omitted).

The lower court, however, did not apply strict scrutiny. It engaged instead in a roving exploration, unbound by any identified level of review, seeking reasons why the Board's concededly race-based decision was somehow not discriminatory. In the lower court's view, the Board's racially-motivated acts were not discriminatory because: (i) after

dumping the results of the race-neutral exams in the trash (because white applicants did too well), *all* test-takers – regardless of race – had to retake the exams (the "Square One" theory); (ii) the successful white applicants lost only an opportunity to be promoted, not a promotion itself (the "No Blood, No Foul" theory); and (iii) the Board did not display racial hatred or "animus" toward those it disadvantaged; instead, it simply wanted to promote a different mix of skin colors (the "Benign Motives" theory). As may well be obvious, the Court has never held that any of these factors immunizes a race-based decision from strict scrutiny; its decisions instead hold to the contrary.

The failure to subject the Board's decision to strict scrutiny by itself constitutes reversible error. But the lower court's decision should also be reversed because a straightforward application of strict scrutiny shows the Board's decision cannot endure. This Court's decisions foreclose the argument that intentional discrimination can be justified by a desire to avoid an unintentional racial imbalance in a public employment roster. Purposeful discrimination is a problem, not a solution.

That problem does not disappear just because the Board believed that a federal law compelled its actions. *No federal law requires discrimination.* The federal law to which the defendants pledge allegiance, Title VII, imposes a general rule of *non-discrimination*. In any event, regardless of what Title VII requires, that statute cannot trump a public employer's obligations under the Equal Protection Clause. Nor does a tacked-on diversity rationale help. The word "diversity" is not a secret password that, once intoned, entitles a public employer to play

a straight numbers game, the type of which this Court has consistently rejected.

Finally, it is worth considering the impact of the racial politicking that inspired the Board's decision on our nation's public safety and law enforcement officials. The firefighters taking these tests are not doing so in their capacity as whites, or as blacks, or as members of any racial group. They are taking these tests as individual public servants trying to make a better life for themselves and the members of their communities. It is government that comes in later, introduces division into unity, and, in the case of New Haven, compounds that division by declaring winners and losers based on race.

New Haven is hardly alone among municipalities caving in to pressure groups when making public safety policy and promotion decisions. Given the unfortunate impact such decisions have on morale, cohesion, recruitment, and retention, the Court should hold such decisions to the same standard it holds other race-based decisions, strict scrutiny. Under that standard, fears of lawsuits and of bad press, and misguided views of a law's requirements, cannot justify the racial coding, balancing, and punishment like that found below.

ARGUMENT

I. The Lower Court Erred By Drawing A Non-Existent Distinction Between The Board's Race-Based Decisionmaking And Condemnable Discrimination.

This Court's decisions establish that race-based decisionmaking of every stripe is inherently suspect and unwaveringly subject to strict scrutiny. *See Grutter*, 539 U.S. at 326-327 ("all governmental uses of race are subject to strict scrutiny"). The Court has consistently rejected pleas to lower the standard where the impacted individuals are white, *see Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 222 (1995) ("the Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments"); where race is said to have been used for "remedial" or "benign" reasons, *see Johnson v. California*, 543 U.S. 499, 505 (2005) ("We have insisted on strict scrutiny in every context, even for so-called 'benign' racial classifications"); and even where the race-based decision was unambiguously made to comply with existing federal law. *See Adarand*, 515 U.S. at 208 (construction contract requiring unlawful set-aside drafted in compliance with federal Transportation statute). Plainly put, "race-based government decisionmaking is categorically prohibited unless narrowly tailored to serve a compelling interest." *Parents Involved in Cmty Sch. v. Seattle Sch. Dist. No. 1*, 127 S.Ct. 2738, 2770 (Thomas, J., concurring) (citing *Grutter*, 539 U.S. at 326).

Whether the Board engaged in race-based decisionmaking is *not* in dispute here. The lower court found as a matter of fact that it did: "Plaintiffs'

evidence – and defendants' own arguments – show that the City's reasons for advocating non-certification were related to the racial distribution of the results." *Ricci*, 554 F.Supp.2d at 152. This was no slip of the tongue or sloppy draftsmanship. As the court continued, a "jury could infer that the defendants were motivated by a concern that too many whites and not enough minorities would be promoted were the lists to be certified." *Id.* Any such inference by the jury would be well-founded indeed; after all, "the *evidence* shows that race was taken into account in the decision not to certify the test results." *Id.* at 158 (emphasis added).

Taking no heed of the Court's precedents, the lower court declined to subject this *concededly* race-based decision to strict scrutiny. In doing so, the court did not claim the favor of any contrary decision in the Court's canon; it did not cite to decisions of this Court at all. It engaged instead in continued exploration to determine what *effect* the Board's racially-inspired acts had on various racial groups, analyzing whether the acts drew "racial classifications" and inflicted "disparate treatment" on one class or another. *Ricci*, 554 F.Supp.2d at 161. Finding no disadvantaged *class*, it found no discrimination, purposeful or otherwise, and thus no need for heightened scrutiny. *Id.*

To describe the lower court's methodology is to condemn it. The first step of a court's Equal Protection analysis – identifying whether the government act should be subjected to strict scrutiny *ends* when the court finds *any* use of race by government. *See Grutter*, 539 U.S. at 326-327 ("all governmental uses of race are subject to strict scrutiny"); *Adarand*, 515 U.S. at 222 ("the

Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments"); *Parents Involved*, 127 S. Ct. at 2751 ("when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny."). No further inquiry into the *nature* of the decision is warranted before triggering strict scrutiny of the government's reasons; if the act is race-based, it must be justified under a single uniform standard. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978) (opinion of Powell, J.) ("[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.").

There was, therefore, no warrant for the lower court's roving exploration for "racial classifications" and "disparate treatment" among groups. Nor was there any need. What the facts of this case show is that race-based decisions *invariably* draw classes and dispense disparate treatment. Here, the Board took race "into account" in examining its certification decision; became "concern[ed] that too many whites and not enough minorities would be promoted;" and declined to certify given the "racial distribution of the results." *Id.* at 152, 158. What did the Board do *besides* divvy the applicants by race and dispense favor to the "class" it preferred?

Rather than move forward with the next logical stage of the inquiry – strict scrutiny – the lower court engaged in a hair-splitting exercise aimed at distinguishing between the Board's race-based decision on the one hand, and discrimination worthy of scrutiny under the Equal Protection Clause on the other. In doing so, the lower court deferred to the

Board's *justifications* for its decision, without subjecting the Board to any burden of proof. This methodology was wrong on several levels.

First, justifications for race-based decisionmaking, by definition, are reserved for strict scrutiny; they cannot immunize decisions from that inquiry. As the Court has explained, "[p]olitical judgments regarding the necessity for the particular classification may be weighed in the constitutional balance ..., but the standard of justification will remain constant." *Adarand*, 515 U.S. at 228 (citation omitted). *Second*, deference to those justifications, at any stage of the inquiry, is inappropriate. *See id.* at 501 ("blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis"). *Third*, the burden is always on the race-based decision maker, not its victim, to justify its actions. *See Parents Involved*, 127 S.Ct. at 2766 (courts are to place "the burden on state actors to demonstrate that their race-based policies are justified" under strict scrutiny) (quoting *Johnson*, 543 U.S. at 506, n. 1).

Setting aside the wrong level of scrutiny, the wrong amount of deference, and the wrong placement of the burden of proof, the lower court's conclusions that the Board's race-based decision was non-discriminatory was faulty. The court formulated three theories for claiming otherwise. None find support in this Court's decisions; instead, this Court's decisions reject them all.

- **<u>The "Square One" Theory.</u>**

The lower court observed that "all applicants took the same test, and the result was the same for all because the test results were discarded and nobody

was promoted." *Ricci*, 554 F. Supp. at 161. In effect, the court suggested that since the Board's race-based decision returned *all* applicants to "square one," the Board conferred no advantage on any "class" of competitors. Acceptance of this theory, however, requires the suspension of reality and a vision of "group rights" this Court has long rejected.

As the court recognized, forty-one applicants took the Captain's exam, and the top nine scorers were white or Hispanic (seven white, two Hispanic). *Id.* at 145. Based on New Haven's "Rule of Three," which mandates that a civil service position be filled from among the three individuals who score best on the exam, the nine top scorers formed the eligible pool for filling the seven vacant Captain slots. *See id.* As for the Lieutenant's exam, seventy-seven applicants took the test, and the top ten scorers, to fill eight vacancies, were white. Had the Board certified the results, therefore, no black applicants would have been promoted.

Accordingly, the Board's refusal to certify the scores was no harmless act. Returning *all* test-takers to square one, including the top scorers eligible for promotion (who are known and identifiable people), resulted in the highest scorers losing their opportunity to fill the vacant slots. Worse, fifteen individuals (seven would-be Captains and eight would-be Lieutenants) appear to have lost more than an opportunity for promotion. They lost the promotions themselves.

It is from those *individuals'* perspective that discrimination must be analyzed. Whatever merit there may be to the district court's position that both white and black "classes" of applicants were returned

to the starting gate, this Court has long held that equal protection rights are "guaranteed to the *individual*," and the "rights established are *personal* rights." *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948) (emphasis added). Regardless of the "class" to which he or she belongs, a citizen's "'personal rights" must "be treated with equal dignity." *City of Richmond v. J.A. Croson*, 488 U.S. 469, 493 (1989); *Miller v. Johnson*, 515 U.S. 900, 911 (1995) ("[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial ... class.") (internal citations and quotation marks omitted). Thus, when the Board acted from its concern that "too many whites ... would be promoted were the lists to be certified" it discriminated against those "whites" that passed the exam but were ordered returned to square one. *Ricci*, 554 F.Supp.2d at 152.[2]

- **The "No Blood, No Foul" Theory.**

The lower court suggested that "performing well on the exam does not create an entitlement to promotion," implying that a race-based decision must strip its victim of an "entitlement" in order to be discriminatory. *Id.* at 161. While it is true that

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[2] *J.E.B. v. Alabama*, 511 U.S. 127, 140 (1994) is on point. Employing a lower level of scrutiny, the Court held that gender-based preemptory challenges "cause[] harm" to "the *individual* jurors who are wrong-fully excluded from participation in the judicial process." *Id.* (emphasis added). It did so regardless of the fact that, as the dissent contended, "all *groups* are subject to the peremptory challenge" making it "hard to see how any *group* is denied equal protection." *Id.* at 159 (Scalia, J., dissenting) (emphasis added).

some bodies of law require an entitlement or vested right before a claim may go forward – the law of takings and of retroactivity come to mind – Equal Protection is not so stringent: "[t]he 'injury in fact' in an equal protection case ... is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit," or, as in this case, "the inability to compete on an equal footing in the bidding process, not the loss of contract." *Northeastern Fla. Chapter, Associated Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 666 (1993).

The lower court's vested rights theory has been repeatedly tested – and roundly rejected – by this Court. Thus, the Court did not require that Adarand Constructors show it would have been "the low bidder on a Government contract" before subjecting the minority set-aside there to strict scrutiny. *Adarand*, 515 U.S. at 211. It did not require the *Gratz* plaintiff to show he "'actually applied' for admission as a transfer student" before subjecting Michigan's racial scoring system to strict scrutiny. *Gratz*, 539 U.S. at 260-61. And it did not require each of the *Parents Involved* plaintiffs to prove their children would necessarily "be denied admission to a school based on their race" before submitting Seattle's program to strict scrutiny. *Parents Involved*, 127 S. Ct. at 2751. As the Chief Justice explained there, "one form of injury under the Equal Protection Clause is being forced to compete in a race-based system that may prejudice the plaintiff." *Id.* (citing cases).

New Haven imposed a race-based system that prejudiced the plaintiffs. Whether it was justified in doing so is reserved for the strict scrutiny inquiry. It

suffices to say here that while the lower court's "no-blood, no foul" theory may find support in playground games of pick-up basketball, it has no support in Equal Protection. In that body of law, the mere placement of a discriminatory "thumb on the scale" will do. *See Hill v. Ross*, 183 F.3d 586, 588 (7th Cir. 1999) (Easterbrook, J.) (explaining that *Adarand* held that "race may not be employed as a thumb on the scale" in doling out government favor).

- **The "Benign Motives" Theory**.

The lower court also refused to apply strict scrutiny because "[n]othing in the record in this case suggests that the [defendants] acted 'because of discriminatory animus toward plaintiffs,'" appearing to require that a race-based decision be driven by bad motives before it can be labeled discriminatory. *Ricci*, 554 F.Supp.2d at 161. The court's theory undermines a generation of cases that subject any and all motives underlying race-based decisionmaking – good, bad, and ugly – to strict scrutiny. Moreover, the court failed to recognize that, even if so-called "benign" motives compelled the decision, such motives do not automatically save the decision from condemnation.

As the Court has explained, "[a]bsent searching judicial inquiry into the justification for ... race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Croson*, 488 U.S. at 493. The Court has "insisted on strict scrutiny in every context, even for so-called 'benign' racial classifications." *Johnson*, 543 U.S. at 505.

Thus, the lower court's contention that "*plaintiffs* cannot show that defendant's acted out of an intentionally discriminatory purpose," *Ricci*, 554 F.Supp.2d at 161, was not only (i) premature (as rendered outside the strict scrutiny analysis), and (ii) wrongly focused on plaintiff's proof, *see Parents Involved*, 127 S.Ct. at 2766 (placing burden of proof on defendants), but it was also utterly besides the point. *Parents Involved*, 127 S.Ct. at 2774 (Thomas, J., concurring) ("benign race-based decisionmaking suffers the same constitutional infirmity as invidious race-based decisionmaking").

Finally, it bears emphasis that, even were "benign" motives justification for declining to employ strict scrutiny, it is highly questionable that the rule fashioned by the lower court would apply here. *See Adarand*, 515 U.S. at 226 ("'it may not always be clear that a so-called preference is in fact benign'") (citation omitted). As the lower court noted, a "jury could infer that the defendants were motivated by a concern that too many whites and not enough minorities would be promoted were the lists to be certified." *Ricci*, 554 F.Supp.2d at 152. The interest to be served, therefore, was the interest in preventing white test-takers from obtaining the promotions they had earned *because they were white*. This is not a benign interest. This is the *antithesis* of a benign interest. *See* A. Bickel, The Morality of Consent 133 (1975) ("The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society.").

* * * *

Because all race-based decisionmaking by government is subject to strict scrutiny, and because the lower court failed to subject concededly race-based decisionmaking to strict scrutiny, the decision should be reversed.

II. The Board's Actions Cannot Withstand Strict Scrutiny.

The fact that the race-based decionmaking at issue here involved outright racial balancing is beyond dispute. After the Board looked at the exam results it decided to start the process anew because "too many whites" passed and too many blacks failed. It was a numbers game pure and simple. Whether this "racial balancing" was made for the odious and inherently suspect reason of avoiding "political backlash" or for more benign purposes matters not. "[O]utright racial balancing" under the Equal Protection Clause is "patently unconstitutional." *See Grutter*, 539 U.S. at 330.

"At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as *individuals*, not simply as *components* of racial, religious, sexual or national class." *Parents Involved*, 127 S.Ct. at 2738 (citations omitted). And because "*all* government action based on race" necessarily involve "*group* classifications," they must all be "subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed." *Grutter*, 539 U.S. at 326.

Because the Equal Protection Clause stands as a bulwark against all forms of state-sponsored racial discrimination, *see Washington v. Davis*, 426 U.S. 229, 239 (1976), it makes no difference whether the

State's actions are malevolent or benevolent. Simple "assurances of good intentions cannot suffice," *Croson*, 488 U.S. at 500, rather, to pass muster, the government must prove that its racial discriminations are "narrowly tailored measures that further compelling governmental interests." *Adarand*, 515 U.S. at 227.

Here, the Board offered three reasons for its race-based decision to discard the exam results. *First*, it professed a desire to avoid the "public criticism" stemming from the promotion of white applicants. *Ricci*, 554 F.Supp.2d at 162. *Second*, it wanted to avoid potential "Title VII lawsuits from minority applicants that, for political reasons, [it] did not want to defend." *Id.* *Third*, it claimed a desire to promote statistical "diversity" within the fire department. *Id.*[3]

The insufficiency of these justifications become clear when viewed through the lens of this Court's prior cases. Because "distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality," to date, this Court has only "recognized two interests that qualify as compelling." *See Parents Involved*, 127 S.Ct. at 2752, 2767. "The first is the compelling interest of remedying the effects of *past intentional* discrimination." *Id.* at 2752. "The second ... is the

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[3] These interests are treated separately from those identified in the prior section. Section I addressed the theories advanced by the *court* for declining to use strict scrutiny. Section II addresses the interests advanced by the *Board* that purport to satisfy strict scrutiny.

interest in diversity," which to date has only been deemed compelling in the limited and unique context of "higher education." *Id.* at 2753.

But even these two interests are narrow in scope. States may not use racially discriminatory measures to remedy "societal discrimination," that is, "discrimination not traceable to its *own* actions." *Id.* at 2758 (*quoting Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 288 (1985) (O'Connor, J., concurring)). Likewise, "[r]acial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity.'" *Parents Involved*, 127 S.Ct. 2738. Instead, whether diversity is compelling depends on "context" and on whether the race of the participants is considered as only one component in the program in which diversity is sought. *Grutter*, 539 U.S. at 327, 337.[4]

There is, therefore, no argument that the government here is pressing an interest previously recognized by the Court as compelling. The only question is whether the interests the government does put forth are worthy of that company.

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[4] Although this case can be decided on narrower grounds, some members of this Court have suggested that the scope of compelling government interests is even narrower. Justice Scalia has argued that the "government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction," since "under our Constitution there can be no such thing as a creditor or debtor race." *See Adarand*, 515 U.S. at 239 (Scalia, J., concurring). Similarly, Justice Thomas has argued that "only those measures the State must take to provide a bulwark against anarchy, or to prevent violence, will constitute a pressing public necessity." *Grutter*, 539 U.S. at 353 (Thomas, J., concurring in part, dissenting in part).

- **The Public Criticism Justification.**

The Board's first reason for scrapping the exam results was the city's desire to avoid "public criticism." *Ricci*, 554 F.Supp.2d at 162. Certainly no case has ever suggested that a state official may trample upon an individual's unalienable right – that "all [people] are created equal" – simply because the official fears that his name will appear in the newspapers. Interests such as these are advanced by hiring better public relations personnel, not by discrimination. As this Court has recognized, every race-based government decision reflects the view that "a politically acceptable burden" can be "imposed on particular citizens on the basis of race." *Parents Involved*, 127 S.Ct. at 2765. If that view alone were sufficient to justify state-sponsored discrimination, nothing would be left of the Equal Protection clause.

- **Compliance With Title VII Justification.**

The Board's second justification is perhaps more worthy of discussion, but no more meritorious. The Board argues that certifying the exam results *might* "subject the City to Title VII lawsuits from minorities that, for *political reasons*, [it] did not want to defend." *Ricci*, 554 F.Supp.2d at 162 (emphasis added).

Merely because the Board finds it more politically palatable to defend *this* discrimination suit, rather than discrimination suits brought by minorities, is hardly compelling. At worst, the desire to avoid minority litigation by promoting more minorities is "discrimination for its own sake, forbidden by the Constitution." *See Croson*, 488 U.S. at 496. At best,

that desire reflects an effort to take the path of least resistance, avoiding the trouble and expense of litigation by a potentially larger group of individuals. That is not sufficient. *Id.* at 508 ("the interest in avoiding bureaucratic effort" is not a compelling government interest," and "'administrative convenience' is not a shibboleth, the mere recitation of which dictates constitutionality.").

We acknowledge, however, that – despite what the lower court found – it may not be the fear of *lawsuits* that drove the Board to discriminate, but the fear of *liability*. There is no question that, as a public employer, the City must tread carefully. On the one hand, it must attempt to "eliminate every vestige of racial segregation and discrimination;" on the other, it must "do away with all governmentally imposed discriminations based on race." *Wygant*, 476 U.S. at 277 (citation omitted). But the fact that these "two interrelated constitutional duties ... are not always harmonious" does not give a public employer *carte blanche* to discriminate in favor of one race and against another. *Id.*

Rather, a public employer must act "with extraordinary care" and be prepared to convince a "trial court" that its chosen course of action was "necessary" to accomplish its "constitutional duties." *Id.* As this Court has explained, until a judicial determination of unlawful discrimination has been made, "an appellate court reviewing a challenge by nonminority employees ... cannot determine whether the race-based action is justified." *Id.* at 278.

No such judicial determination has been made here. The Board never claimed that its actions were compelled by the Equal Protection Clause. Nor could

it. At its outer limits, the Equal Protection Clause permits race-based decision-making to remedy "past intentional discrimination." *See Parents Involved*, 127 S.Ct. 2752. But the record is barren of evidence that the New Haven Fire Department ever passively permitted, let alone actively condoned, intentionally discriminatory employment practices.

Nor can the government argue that it has a compelling interest in remedying the *unintentional* disparate impact the Board claims it *would have* caused by certifying the results. While there was a racial imbalance among the group of passing applicants, "the Constitution is not violated by racial imbalance ... without more." *Parents Involved*, 127 S.Ct. at 2752. There is a "distinction between segregation by state action and racial imbalance caused by other factors" that has been "central" to the Court's jurisprudence "for generations." *Id.* at 2761. If that jurisprudence shows anything, it is that state action worthy of remedial, race-based measures must involve *intentional* racial discrimination, not color blind actions that merely have a disparate impact. *See id.* at 2761 (taking the dissent to task for failing to recognize the distinction between "*de jure* and *de facto*" segregation).

Unable to point to any constitutional obligation to discard the exam results, the Board directs its attention to Title VII. But even if the Board believed that promoting the highest scoring applicants would violate Title VII, that is not enough. "The Constitution and [the Court's] precedents require more" than the "good faith" of the state actors who engage in racial discrimination. *Parents Involved*, 127 S.Ct. at 2766. Under the two pronged strict scrutiny test, the Board must establish that (i)

compliance with Title VII is, *ipso facto*, a compelling state interest; and (ii) scrapping the test results was the least restrictive way of complying with Title VII. The Board can do neither.[5]

Compliance with Title VI cannot supply a compelling government interest because a statutory obligation cannot trump a constitutional command. The Court made this self-evident observation "explicit" in *Adarand*, holding that "[f]ederal racial classifications, like those of a State," are not immune from the strictest scrutiny just because Congress enacted that classification. *Adarand*, 515 U.S. at 235. Were it otherwise, the Fourteenth Amendment would be a nullity. As Judge Easterbrook has observed, if compliance with governmental regulations could "supply a compelling governmental interest in making decisions based on race," then the government could "adopt racial quotas" and the "direction would be self-justifying....Such a circular process would drain the equal protection clause of meaning." *Biondo v. City of Chicago*, 382 F.3d 680, 684 (7th Cir. 2004) (rejecting argument that Title VII supplied a justification for the Chicago Fire Department's affirmative action plan).[6]

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[5] It should be noted that the Board is not claiming that compliance with Title VII would *serve* a compelling government interest: the board is claiming that compliance with Title VII is *itself* a compelling government interest.

[6] Nor is it relevant that the Board is a local government entity, compelled to comply with Title VII. If "blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis" when scrutinizing a federal actor's compliance with federal law, *see Croson*, 488 U.S. at 501,

Using a federal law to justify intentional racial discrimination, irrespective of whether that law serves a compelling governmental interest, is problematic enough. Allowing Title VII to do so is even worse, because this would wipe out the critical constitutional distinction between public and private employers. This Court has "always ... employed a *more stringent* standard ... to test the validity of the *means* chosen by a State to accomplish its race-conscious purposes," than those chosen by private actors to comply with their obligations under Title VII. *Wygant*, 476 U.S. at 279 (emphasis added). It is for this reason that "*public* employers must [separately] justify the adoption and implementation of a voluntary affirmative action plan under the Equal Protection Clause," irrespective of what Title VII may allow or purport to dictate. *Johnson v. Transportation Agency, Santa Clara County, Cal.*, 480 U.S. 616, 620 n. 2 (1987) (rejecting argument that Title VII and the Equal Protection Clause are "coterminous.").

The dangers of allowing Title VII to supplant Equal Protection analysis is evident. Title VII is economic legislation, "enacted pursuant to the commerce power to regulate purely private decision-making and ... [is] not intended to incorporate and particularize the commands of the Fifth and Fourteenth Amendments." *Johnson*, 480 U.S. at 628 n. 6. As such, no matter how legitimate the interests served by Title VII, because it is not limited to remedying past governmental discrimination or

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then such deference also has no place when scrutinizing a State actor's compliance with that same law.

promoting diversity, it is not confined to serving "compelling governmental interests." It is broader in reach and sanctions more race-conscious actions, at least by private parties, than has been permitted by public employers under this Court's prior decisions.

Nothing in this Court's prior cases suggests the Title VII was meant to *loosen* the restrictions against state-sanctioned discrimination. Rather, as *Transportation Agency* makes clear, the obligation of a public employer under Title VII was only "intended to extend *as far as*" the Constitution allows, not farther. *Id.* This is as it should be. To hold otherwise would only postpone the day when race will no longer be a factor in governmental hiring decisions. *Parents Involved*, 127 S.Ct. at 2768 ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.").

The Board's "Title VII made me do it" theory, therefore, fails the first prong of the strict scrutiny test. It also fails the second. Certainly, nothing in Title VII *requires* a state or local government to engage in intentional racial discrimination. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801(1973) ("it is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise"). To the contrary, Congress made it clear that an employer's desire to mitigate or avoid a disparate impact does not justify preferential treatment for any group. *See* 42 U.S.C. § 2000e-2(j). Because the Board cannot show that certification of the exam results would violate Title VII, its decision not to certify the results was not narrowly tailored to comply with Title VII.

- **Racial Diversity Justification.**

The Board's third reason for discarding the exam results is its claim that promoting off of this list would "undermine [its] goal of diversity." *Ricci*, 554 F.Supp.2d at 162. In the Board's view, too few minorities passed the test to ensure that the pool of supervisors reflects the same racial mix as the pool of pre-test applicants. But the Board's desire to have more black supervisors, "for no reason other than their race or ethnic origin," is not merely insufficiently compelling to justify racial classifications, it was "discrimination for its own sake, forbidden by the Constitution." *Parents Involved*, 127 S.Ct. at 2779 (quoting *Bakke*, 438 U.S. at 307 (Powell, J.)).

Invocation of the buzzword "diversity" cannot hide the fact that the Board was really playing a numbers game. The Board is only the latest of many state actors to raise the diversity umbrella since the Court first recognized that, in limited circumstances, diversity can provide a state with the compelling interest necessary to justify racial discrimination.

But in *Parents Involved*, this Court exposed that ploy and put a definitive end to it. "Racial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by re-labeling it 'racial diversity.'" 127 S.Ct. at 2758. Put simply, "racial balance ... itself cannot be the goal, whether labeled 'racial diversity' or anything else." *Id.* at 2759. Because the "Equal Protection Clause protects persons, not groups," *id.* at 2765, any interest in promoting diversity must focus on "each applicant as an *individual*, not simply as a member of a

particular group." *Id.* at 2753 (citing *Grutter*, 539 U.S. at 326) (emphasis added).

Here, the Board, like the lower court, did not focus on the successful promotion applicants as individuals. It scrapped the test results because "too many whites" and "not enough minorities" had passed. *Ricci*, 554 F.Supp.2d at 152. Its decision to reject the results was, therefore, "tied to ... racial demographics, rather than any pedagogic concept of the level of diversity needed to obtain" specific, clearly articulated benefits in the workplace. *Parents Involved*, 127 S.Ct. at 2743.

The Board never identified just what would be compelling about its insistence on a more racially diverse group of supervisors. Certainly it never suggested that a different racial mix of supervisors would lead to faster response times, better service, or more efficient operations. At most, the Board speculated that promoting minorities because of their race, rather than because of their qualifications, would provide better "managerial role models for aspiring firefighters." *Ricci*, 554 F.Supp.2d at 162. But this just perpetuates the myth that the only role models an "aspiring firefighter" looks up to are those with the same color skin, and not those who have worked hard and excelled at their jobs. The myth itself "demeans the dignity and worth" of every applicant and aspiring firefighter because it judges them "by ancestry instead of [their] own merit and essential qualities." *Parents Involved*, 127 S.Ct. at 2767.

Nor did the Board conduct the type of "holistic review" that *Grutter* held could justify the use of race to advance diversity in a different context. *Grutter*,

539 U.S. at 337. The Board did not look at the individual applicants who passed the City's exam and conclude that, aside from their skin color, they might otherwise contribute to a diverse workplace by, for example, examining their background, upbringing, education, interests, or otherwise. The Board never presented any evidence that a different crop of applicants would better serve the community. It simply decided that there were too few minorities and too many whites.

This is exactly the type of "non-individualized, mechanical" race-based decision-making that offends the Constitution. *Parents Involved*, 127 S.Ct. at 2754 (quoting *Gratz*, 539 U.S. at 276 (O'Connor, J., concurring)). As this Court explained, "this working backward to achieve a particular type of racial balance, rather than working forward from some demonstration of the level of diversity that provides the purported benefits, is a fatal flaw under our existing precedent." *Id.* at 2758.[7]

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[7] Because the Board's diversity rationale was synonymous with "patently unconstitutional" racial balancing, the Board has yet to identify a "compelling governmental interest" to justify its actions. Thus, there is no need to determine whether the Board's actions were "narrowly tailored" to achieve its goals. Likewise, because the Board has failed to articulate a compelling interest, there is no merit to the Board's argument that discarding the exam results was a necessary first step in achieving its as-yet-unidentified objectives. In any event, it should be noted that the Board did not consider any less restrictive or non-racial alternatives to achieve such unarticulated interests. *Croson*, 488 U.S. at 507.

III. The Decision Below Undermines The Public Interest In Cohesion, Retention, and Recruitment In The Public Safety Sector

The foregoing sections of this Brief explain why, as a *legal* matter, the Court's most searching requirements for government's race-based decisionmaking should apply. But NAPO also believes it is important for the Court to understand why, as a *practical* matter, the Court should hold the type of decisionmaking here to the strictest of standards. The police departments, officers, and unions represented by NAPO, just like the fire departments and firefighters at issue here, must of course live with and abide by this Court's decisions and the impact they have on them as brothers and sisters-in-arms in the quest for public safety. The Court, NAPO respectfully believes, should therefore take heed of just what that impact is before issuing its decision.

The racial politics injected far too frequently into the daily lives of public safety officers comes most often not from the officers themselves – who are, in the main, effectively colorblind – but rather from the outside. Those outside sources, often agenda-driven activists or over-ambitious politicians, can contribute to a toxic atmosphere in which the paramount duty of safety and justice risks being crowded out by race-based fear-mongering. The racial politicking described by the plaintiffs here, and acknowledged by the district court, is exceedingly familiar to NAPO and its constituents. No police or fire department of modest or greater size is immune from the corrosive impact of racial politics. Not a single one would claim that racial politics enhance a department's

ability to solve crimes or fight fires; indeed, frequently the opposite is true.

None of this is to say that issues of equality, opportunity, and diversity are not important to NAPO and its friends in the public safety arena. To the contrary, police and fire departments have been among America's leaders in offering members of minority groups opportunities to join their organizations and advance according to their abilities. Nor does NAPO suggest that the historic mistreatment of some minority groups by governments and their agents have left no continuing legacy. NAPO's constituents simply believe that the best way to do the jobs required of them in service of the citizenry, *and* to address these legacy issues, is to insist that, to the fullest extent permitted by law, public safety organizations operate as strict meritocracies.

Such meritocracies contribute to two of the more important factors in a public safety work environment: camaraderie and fairness. Among crime-fighters and firefighters, the importance of camaraderie can hardly be overstated; when lives are at stake, the trust and respect bred by camaraderie directly affects one's ability to persevere through the most difficult of circumstances. That camaraderie is undermined when officers are made to feel like members of a *race*, rather than members of a *team*.

While camaraderie largely applies to the relationship among fellow officers, fairness primarily applies to the relationship between officers and supervisors. The impact of race-based promotion decisions does not end when the Board votes; officers

and supervisors must live and cope with these decisions in their station houses. In addition to impacting "life in the house," fairness issues directly influence NAPO's constituents' ability to recruit and retain the best personnel. If recruits and current officers understand that they are entering or working within a world in which they will be judged based on their abilities and their continuing acquisition of skills and knowledge, they will find public service a worthy investment of their time and sweat. If, however, they are forced to contend with the implications of non-meritorious factors like the color of their skin, their gender, or other irrelevant characteristics in their pursuit of advancement, they may understandably consider other career opportunities.

The facts of this case provide a cautionary tale for the potential of racial politics to inflict a deleterious impact on a department's recruitment and retention. Consider the example of Plaintiff Michael Marcarelli, a notoriously high-achiever who finished first on the Captain's exam. *See* Pet. for Writ of Cert. of Frank Ricci, et. al, at 39-40. Mr. Marcarelli, described as having "extraordinary credentials, education, and experience," is precisely the kind of person every police and fire organization wants to recruit and cultivate. *See id.* at 40. The Board's decision to deny him his promotion, solely because he is white, can impose a destructive impact on New Haven's ability to keep this particular Mr. Marcarelli, and other municipalities' ability to attract and retain Mr. Marcarelli's of their own.

Consider also the example of Plaintiff Frank Ricci. The costs to Mr. Ricci in taking one of the civil service exams were "8 to 13 hours a day" of study

and more than "$1,000 in funds," incurred in no small part because Mr. Ricci is dyslexic and needed to pay someone to read the study materials onto tape. *Ricci*, 530 F.3d at 104. Mr. Ricci also passed the test, but could not overcome his other "disability": his skin color. Again, NAPO's members want the Mr. Ricci's of the world – whether they are learning impaired in some manner, or perhaps come from a background in which formal, advanced education was not an option – to join its departments, to work hard, and to go as far as their talents will take them. Their incentives for doing so, however, are undermined by race-based decisions like the one at issue here.

Particularly in this new day in which our new President was launched on the national scene by declaring "[t]here is not a Black America and a White America and Latino America and Asian America – there's the United States of America," NAPO and its partners in law enforcement look forward to a time in which people are not "black" police officers or "white" officers, or "black" firefighters or "white" firefighters. But when they are just police officers. And firefighters. United in pursuit of the betterment of our innumerable communities, free from the corrosive impact of racial politicking. A decision striking a blow against such corrosion will help make that ideal a reality.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Court of Appeals.

Respectfully submitted.

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